

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UMAR HASAN ABDULLA,

Defendant-Appellant.

UNPUBLISHED

September 22, 2000

No. 217435

Ingham Circuit Court

LC No. 95-068673-FH

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals, by leave granted, from the trial court's order denying his motion for relief from judgment. We affirm.

Defendant was charged with breaking and entering, MCL 750.110; MSA 28.305. Specifically, defendant allegedly used a rock or other object to break the glass entrance of a bait and tackle shop at approximately 1:00 a.m. Upon entry, defendant grabbed the cash register closest to the door and fled in a gray Audi. An anonymous telephone call reported the offense in progress. The caller also identified the perpetrator as wearing a winter coat with a fur trim. At 2:45 a.m., Officer Scott Schuelke observed defendant's vehicle. Two nights earlier, there had been a report of an attempted breaking and entering at a preschool involving a vehicle that matched the license plate of defendant's vehicle. Officer Schuelke pursued defendant to his home where he was apprehended. Defendant was wearing the same type of coat as the perpetrator of the breaking and entering. Additionally, there was money strewn about the vehicle, consisting of both paper currency and coins. Prior to trial, defendant filed an amended notice of alibi. Defendant alleged that during the time of the alleged offense, he was at an upstairs apartment on Saginaw Street in Lansing, Michigan. Additionally, defendant alleged that he loaned his vehicle to other individuals and his coat was in the car at the time of the loan. Defendant alleged that Bernice Jones, Ham Smith and Ortha Haywood would testify that he was at the apartment and saw individuals borrow defendant's vehicle. Defendant alleged that the individuals who used his vehicle were Dawin McFadden, Danny Robertson, and an individual known as "Short Dog."

After the prosecutor rested, defendant requested an adjournment because alibi witness Haywood was not present. Trial was adjourned early Friday morning and resumed the following

Monday. Despite the representation in the notice of alibi that Jones would testify that defendant was at an apartment in Lansing and would name the individuals who borrowed defendant's vehicle, she did not testify in accordance with those allegations. Rather, Jones testified that she was with defendant from approximately 1:50 to 2:20 a.m. when he took her to the store to get beer. Defendant's wife testified that defendant frequently loaned or "rented" the gray Audi. However, she did not provide an alibi regarding defendant's whereabouts at the time of the offense. The defense rested, and closing arguments were presented. During closing arguments by the defense, Haywood appeared. The trial court was notified, but did not mention the arrival to the parties. After the jury was sent to deliberate, the trial court noted that Haywood appeared during defendant's closing. Defense counsel did not formally seek to reopen the proofs. The trial court noted that the case had been adjourned over the weekend to secure Haywood's presence and did not sua sponte reopen the proofs. The jury convicted defendant as charged.

On appeal, this Court held that defendant's right to compulsory process was violated because of the failure to reopen the proofs to allow Haywood to testify.¹ This Court ordered that a hearing would occur on remand to determine whether a viable, noncumulative alibi defense could be presented:

However, on the record as it exists, we have no alternative but to remand this matter for a *Pearson* [*People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979)] - type hearing at which Haywood may be examined and cross-examined to determine whether a viable alibi defense otherwise unavailable and not cumulative of other evidence can be presented. If so, a new trial shall be ordered by the trial court; if not, in the absence of other reversible error . . . , defendant's conviction is affirmed. [*Abdulla*, *supra*, slip op p 3.]

On remand, the trial court ordered funds for a private investigator to locate an address for Haywood. Despite numerous potential addresses, Haywood was not located, and a hearing was not held. Instead, defendant moved for relief from judgment and asked that the trial court set aside his conviction. Specifically, defendant alleged that the "remedy" provided by this Court was a hearing that was unable to occur, therefore, the conviction should be vacated. The trial court denied the motion, noting that the Court of Appeals could have vacated the conviction due to the violation of the right of compulsory process, but declined to do so.

Defendant argues that relief from judgment is proper because of the failure to obtain Haywood's testimony. We disagree. MCR 6.508(D) provides:

The defendant has the burden of establishing entitlement to the relief requested.
The court may not grant relief to the defendant if the motion

¹ *People v Abdulla*, unpublished opinion per curiam of the Court of Appeals issued July 11, 1997 (Docket No. 188686).

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

In the prior appeal, this Court declined to outright reverse defendant's conviction. Rather, a hearing was to be held regarding the type of alibi testimony that Haywood would have given. Defendant did not present any offer of proof regarding the type of alibi testimony that would have been presented, irrespective of the failure to locate Haywood to testify in person. This Court held that if there was evidence that the alibi defense would not be cumulative, a new trial should be granted, otherwise the conviction would be affirmed. Because there is no offer of proof to establish that Haywood's testimony would not be cumulative to the testimony of the other witnesses, in accordance with our prior opinion, defendant's conviction is affirmed.² MCR 6.508(D).

Furthermore, when reviewing a preserved, constitutional error that is not a structural defect, this Court must determine whether the beneficiary of the error can establish that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Anderson*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). In the present case, the error was not a structural defect because it occurred during the presentation of the case and could be assessed in the context of other evidence presented at trial. *Anderson, supra*. We conclude that any error was harmless beyond a reasonable doubt. Defendant's vehicle was observed at the scene of the breaking and entering. Defendant was found in the vehicle within two hours of the offense with the till in the trunk and money strewn about his vehicle. While defendant alleged that he could place the coat in the vehicle that was rented, there was no such evidence regarding the coat presented at trial. Furthermore, while defendant's wife testified that defendant had rented the vehicle in the past, she could not account for the evening in question.

² Without an offer of proof, reversal of defendant's conviction is not warranted. The filing of the notice of alibi merely identifies the names and potential testimony. However, there is no guarantee that the named alibi witnesses will testify in accordance with the information contained in the notice. In this case, defendant's alibi witness Jones did not testify in accordance with the notice. Additionally, defendant's wife did not provide an alibi. Accordingly, reversal in this instance would be premised on the speculation that Haywood would have testified in accordance with the information contained in the notice that did not prove to be true regarding the other alibi witnesses. Furthermore, we note that there is no explanation in the record regarding the attempt to locate the witnesses who "rented" defendant's vehicle at the time of the offense. Arguably, those witnesses could have been provided as an alternative to Haywood's testimony.

The circumstantial evidence supported defendant's conviction. Accordingly, we conclude that any error was harmless beyond a reasonable doubt. *Carines, supra*.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage